SUPREME COURT U S

Supreme Court, U. S.
FILED

FEB 3 1975

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-638

TEXACO INC.,

Petitioner,

versus

STATE OF LOUISIANA, ET AL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Charles F. Bailey
Bailey & Hollier
Post Office Box 52209
Lafayette, Louisiana 70501
Attorney for Petitioner

Wiley G. Lastrapes
William J. Conrad
Legal Department
Texaco Inc.
Post Office Box 60252
New Orleans, Louisiana 70160
Of Counsel

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-638

TEXACO INC.,

Petitioner,

versus

STATE OF LOUISIANA, ET AL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

---

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Petitioner respectfully requests that this Honorable Court grant rehearing of its order dated January 13, 1975 which denied certiorari and that the Court now grant certiorari with respect to the proper location of the present ordinary high water line of Six Mile Lake as the inland boundary of the State's title to the area involved in this suit.

This case involves a title dispute between the State of Louisiana and riparian owners to an area of land extending from the original ordinary high water line

of Six Mile Lake as it existed at statehood (1812) and the present ordinary low water line of that water body. If any part of the disputed area falls below the original but above the present ordinary high water line, federal law governs and such acreage enures to the riparian owners as an *accretive* area under the legal principles announced by this Honorable Court in *Bonelli Cattle Company v. Arizona*, 94 S. Ct. 517, 38 L. Ed. 2d 526 (1973). If any part of the area in dispute is below the present ordinary high water line, it forms part of the bed of Six Mile Lake and belongs to the State by virtue of sovereignty.

As one of the new states, Louisiana acquired under the equal footing doctrine all inland bodies of navigable water (including Six Mile Lake) up to the ordinary high water line existing at the time of statehood, but by express codal provisions has relinquished the banks of navigable rivers and other streams, i.e., the area between ordinary high and low water, to the riparian owners. It having been decided herein that Six Mile Lake is not a river or stream, the State has retained ownership up to the high water elevation. The issue here is the location of that line as the boundary marking the limits between State and private ownership. Depending on that location property of enormous value may fall within one or the other title.

Prior to the *Bonelli* case it was the established jurisprudence of Louisiana that the State's title to all water bodies so acquired, except rivers and other streams, extended to and remained permanently fixed at the ordinary high water elevation existing at the

time of statehood unless the State's title was extended inland by encroachment of the water body on the adjoining shore. *E.g., State v. Jefferson Island Salt Mining Co., Inc.*, 183 La. 304, 163 So. 145 (1945); *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1937). The *Bonelli* case now firmly holds that by federal law the State's title mechanically follows changes in the ordinary high water line, hence a defeasance of that title takes place which enures as accretion to the riparian owner when part of the original bed becomes emergent above the *presently existing* high water elevation.

This case having been tried some 7 years before the *Bonelli* decision was handed down, the only issues in the case were (1) the classification of Six Mile Lake as either a lake or a stream, and (2) the location of the present ordinary low water line of that water body. Location of the present low water line was required because if Six Mile Lake was classified as a stream the riparian title would extend to that line. On the other hand location of the present high water line was not then necessary because if the water body was classified as a lake the State title extended to and remained permanently fixed under Louisiana jurisprudence at the high water line existing at the time of statehood.[1]

With the record in that posture (and on the basis of the Court's classification of the water body as a "lake") the Louisiana Supreme Court found that the entire area in dispute was located below the *present*

1 By the pleadings this line was admitted to be the same as the meander line of the water body as shown by the governmental survey of 1842.

high water line of Six Mile Lake and expressly defined the inland boundary of the area awarded to the State as the original high water line of said water body as it existed at the time of statehood in 1812.

In opposing certiorari respondents, State of Louisiana and Gulf Oil Corporation ("State-Gulf"), contended that the Court did not give a precise location to the *present* high water line of Six Mile Lake, but only found that the area in dispute[2] falls below that elevation. This distinction is one without a difference since obviously the Court had to locate the present high water elevation either to define precisely the inland boundary of State ownership or to establish that the disputed area in the case falls below that elevation. *The full thrust of the opposition by State-Gulf is that the record contained all evidence needed to enable the Court to determine the location of the present ordinary high water line and that the Court found as a fact that the entire area in dispute is below that elevation.* Denial of certiorari (on the alternative federal question presented by the petition) can only mean that this Honorable Court accepted that contention.

---

2 The area in dispute is defined by the pleadings as extending from the original high water line of Six Mile Lake to its present low water line. This was so because under the Louisiana jurisprudence governing at the time of suit and trial State ownership would extend inland to the *original* high water line if the water body was classified as a lake and private ownership would extend outward to the present low water line if it were classified as a stream.

The Riparian Owners Have Not Had Their Day In Court For Establishment Of The Present High Water Line Of Six Mile Lake.

If rehearing is denied and the decision of the Louisiana Supreme Court becomes final, the riparian owners will have been deprived of their claim to property of potentially enormous value in violation of the due process clause of the Fourteenth Amendment to the Constitution. These parties at their sole risk and expense completed three wells below the original ordinary high water line of Six Mile Lake which have produced oil and gas valued in the millions of dollars. Between the original and the present high water lines of the water body, there may be a substantial area which would either include these well sites or participate in production therefrom as the result of units established around the wells by the Louisiana Department of Conservation.

It is entirely unrealistic to say that the riparian owners have had their hearing with respect to the present ordinary high water line on the basis of evidence introduced to show the present ordinary low water line of Six Mile Lake.

The evidence in the record on this subject consists entirely of land surface elevations calculated by engineers with relation to the mean sea level datum and daily high and low water stages of Six Mile Lake, with relation to the same datum, as reflected by gauge records over a period of 32 years ending in February 1963 — over 4 years before this case came to trial.

In their brief on rehearing before the Louisiana Supreme Court, State-Gulf calculated the present high water mark as of February 1963, by averaging the daily highs from the gauge records during each *high water season* throughout the 32 year period referred to above. This calculation reflected a high water line which included all of the area in dispute and is the one which the Louisiana Supreme Court accepted in the decision complained of herein.[3] Later in opposing a rehearing of that decision, State-Gulf using the same gauge records calculated the present high water line (as of February 1963) by averaging all daily high water stages of each year throughout an 18.6 year "astronomical cycle" beginning in 1944 and extending through 1962. This calculation although lower than the first one also included all of the area in dispute. Since rehearing was denied the Louisiana Supreme Court held fast to its acceptance of one or the other of these calculations.

The high water elevation, however, cannot be calculated or determined by either method. The first method is entirely invalid as it uses only daily highs of the high water season, (ignoring the daily highs of approximately one-half the year during low water season) and also averages in peak flow and extraordinary flood stages emanating from the Mississippi River. The 18.6 year astronomical cycle used was the one adopted by this Court in *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 56 S. Ct. 23 (1935) to

---

3 In its opinion the State Court did not set forth the basis for its finding that the area in dispute falls below the present high water line. However, State-Gulf's calculation was the only one before the Court and presumably was the basis for the finding set forth in its opinion.

determine the ordinary high water line along a shore of the Pacific Ocean (Los Angeles harbor) and is appropriate only for the determination of "*mean high tide*".[4] It was expressly recognized in *United States v. Washington*, 294 F. 2d 830 (1961), cert. denied 369 U.S. 817, 82 S. Ct. 828, and impliedly so in *U.S. v. Claridge*, 416 F. 2d 933 (1969), cert. denied 397 U.S. 961, 90 S. Ct. 994, that the *Borax* rule applies only to water bodies under the strict influence of the tides and not to water bodies "which have no absolute ascertainable level because of variations of flow from a multitude of causes". It is not disputed that Six Mile Lake, subject as it is to the flood stages of the Mississippi, is in the latter category.

For waterbodies of this kind (having variations of flow and water stages from numerous causes) the high water mark is determined principally from natural physical characteristics placed upon the land by the action of the water. As stated in *Claridge*, this means physical characteristics resulting from the ordinary flow of the waterbody and does not extend to the peak flow or flood stages. Even in the absence of such physical characteristics on the ground, the bed of a waterbody defined by the ordinary high water line is generally accepted to mean that which contains it at its average and mean stage during the entire year "without reference to the extraordinary freshets of the winter or spring or the extreme droughts of the summer or autumn." The bed as so defined includes

---

4 The definition of mean high tide is the average elevation of all *high tides* as observed at a location through a complete tidal cycle of 18.6 years. *This is an unchanging elevation*, and the line of mean high tide is where that *unchanging elevation* meets the shore as it exists at any particular time. *United States v. Washington*, 294 F. 2d 830, 834.

areas kept practically bare of vegetation by the wash of the waters from year to year and excludes areas of relatively fast land which are usually covered by upland grasses and vegetation. *Oklahoma v. Texas*, 260 U.S. 606, 635, 43 S.Ct. 221, 67 L.Ed. 428 (1923); *Alabama v. Georgia*, 64 U.S. (23 How.) 505, 515, 16 L.Ed. 556 (1859).

The calculations of State-Gulf (on which the State Court made its findings) were not only incorrect, as already indicated, but were based on a record in this case which is incomplete. As observed above, the gauge records offered in evidence do not go beyond February 1963 and hence do not include a period of some 4 years prior to trial of this case. Additionally, in October of the same year locks were installed by the Army Engineers and have since been in operation at Turnbull Island which allow only optimum amounts of the waters of the Mississippi at both ordinary and flood stages to enter the Atchafalaya. This artificial structure could have had a marked effect on the ordinary high water line of Six Mile Lake as it existed at the time of trial and for several years prior thereto. A like situation was created by the Hoover Dam with respect to the Colorado River and it has been judicially recognized that operation of that dam lowered the high water elevation of that river and that state ownership of its bed was limited accordingly. *United States v. Claridge*, 416 F. 2d 933 (1969), cert. denied 397 U.S. 961, 90 S. Ct. 994; *Bonelli Cattle Company v. Arizona*, supra.

CONCLUSION

The due process clause of the Fourteenth Amendment to the Constitution of the United States requires that petitioner and the other riparian owners be given their day in Court for determination of the proper boundary between State and private ownership in this case.

For the reasons herein set forth, as well as in the petition for certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

Charles F. Bailey
Bailey & Hollier
Post Office Box 52209
Lafayette, Louisiana 70501

Attorney for Petitioner,
Texaco Inc.

Wiley G. Lastrapes
William J. Conrad
Legal Department
Texaco Inc.
Post Office Box 60252
New Orleans, Louisiana 70160
Of Counsel

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

_____

Charles F. Bailey